Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JEFFREY DARRYL WAFER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the indictment charging a violation of 18 U.S.C. 924(c) was defective for failure to allege an offense?

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PETITION FOR WRIT OF CERTIORARI

The petitioner petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The decisions of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the District Court and denying the Petition for Rehearing are not reported. The decisions are reproduced in the Appendix to this petition at Pet. App.1, 7.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the District Court was entered on January 5, 2006. The Petition for Rehearing

was denied on February 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. section 924(c) provides, in pertinent part, that:

> Any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment for such crime of violence or drug trafficking crime [receive an additional penalty].

STATEMENT OF THE CASE

This case arises from a prosecution of the defendant in the district court resulting in convictions for bank robbery, in violation of 18 U.S.C. sections 2113 (a) and (d), and a firearms offense, pursuant to 18 U.S.C. section 924(c) Jurisdiction in the Court of Appeals was based upon 28 U.S.C. section 1291.

On January 5, 2006, a panel of the United States Court of Appeals for the Fourth Circuit issued an opinion affirming the judgment of the District Court. A petition for rehearing and rehearing *en banc* was denied on February 13, 2006.

REASON FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THIS CASE BECAUSE A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

ARGUMENT

The indictment in this case charged defendant Wafer, in a single count, with using and carrying a firearm during a crime

of violence (bank robbery), **and** possessing a firearm during a crime of violence (bank robbery), pursuant to 18 U.S.C. section 924(c). In *United States v. Combs*, 369 F.3d 925 (6th Cir. 2004), the court held that the statute creates two separate offenses. One offense is using or carrying a firearm during and in relation to a drug trafficking crime (or crime of violence), and the other is possessing a firearm in furtherance of a drug trafficking crime (or a crime of violence). Combs' 924(c) conviction was reversed because the indictment combined the two offenses in one count. The court held that the indictment was insufficient because it failed to allege any offense under federal law.

The court in *Combs* cited a similar holding from a district court in Virginia, *United States v. Pleasant*, 125 F. Supp. 2d 173, (E.D. Va. 2000). The harm from combining the two offenses into a single count in the indictment is that the indictment is duplicitous. Moreover, the indictment, when it contains an amalgam of the two crimes created by the statute, charges an offense that is not recognizable under the federal criminal code.

The court in *Combs* defined the two separate offenses:

> (1) Any person who, **during and in relation to** any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, **uses or carries** a firearm (the "use offense");
>
> (2) Any person who, **in furtherance of** any such crime, **possesses** a firearm . . . . (the "possession" offense).

In *United States v. Savoires*, 430 F.3d 376 (6th Cir. 2005), the court held that a conviction under 18 U.S.C. 924(c) could not stand because the indictment charging the offense combined the use and possession offenses set out above into a single count in the indictment. The court examined the indictment and the jury instructions, and concluded that the jury verdict could have been predicated upon a combination of elements of the use offense and the possession offense.

In the instant case, the indictment, in a single count, charged Wafer with using and carrying a firearm during the bank robbery, and with possession of the firearm during the bank robbery. The jury was instructed that it could convict Wafer if it found that he used or carried the firearm, or possessed the firearm, during the bank robbery. No special verdict was used, so that the jury could separately consider the two offenses in the single count. As in *Pleasant, Combs* and *Savoires,* the amalgamation of the two offenses in a single count created a new and different offense, and one which is not a creature of the federal criminal code. Wafer was therefore convicted of an offense which is not a crime under the federal criminal code, and his conviction cannot stand.

In this case, the decision of the panel of the court of appeals did not address Wafer's argument that the indictment combined two offenses into a single count, creating a separate offense not recognized under the federal criminal code. Instead, the panel concluded that because Wafer did not raise the duplicity challenge in the district court, he had waived the right to challenge the indictment. Wafer's claim that he was convicted on an insufficient indictment which failed to allege an offense was not considered or ruled upon by the panel.

CONCLUSION

For the reasons stated above, petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-4332

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

QUINCY DEMERY,
Defendant-Appellant.

No. 05-4510

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY DARRYL WAFER,
Defendant-Appellant.

Appeals from the United States District Court for the Western District of North Carolina, at Statesville. Richard L. Voorhees, District Judge. (CR-03-15)

Submitted: November 30, 2005
Decided: January 5, 2006

Before LUTTIG and WILLIAMS, *Circuit Judges*, and HAMILTON, *Senior Circuit Judge*.

Affirmed by unpublished per curiam opinion.

Reita P. Pendry, Charlotte, North Carolina; Andrew B. Banzhoff, Asheville, North Carolina, for Appellants. Gretchen C. F. Shappert, United States Attorney, Matthew T. Martens, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Jeffrey Darryl Wafer and Quincy Demery appeal their convictions for bank robbery in violation of 18 U.S.C. § 2113(a), (d) (2000) and using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (2000). Finding no reversible error, we affirm.

Demery and Wafer claim that the district court erred in denying their motion for a judgment of acquittal. We review the district court's decision to deny a motion for judgment of acquittal de novo. *United States v. Gallimore*, 247 F.3d 134, 136 (4th Cir. 2001). If the motion was based on insufficiency of the evidence, the verdict must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

Demery and Wafer argue that no direct evidence of their guilt exists and that the Government presented only circumstantial evidence. A defendant may be convicted using circumstantial evidence, and the government is given the benefit of all reasonable inferences from the facts proven to the facts sought to be established. *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982). The jury, not the reviewing court, weighs the credibility of the evidence and

resolves any conflicts in the evidence. *United States v. Murphy*, 35 F.3d 143, 148 (4th Cir. 1994).

While no direct evidence existed and no one piece of circumstantial evidence is conclusive, taking all the circumstantial evidence together the jury weighed the credibility of the witnesses and evidence and made reasonable inferences that Demery and Wafer committed the bank robbery. Taking the view most favorable to the Government, there is sufficient evidence to support the guilty verdict. The district court did not err when it denied Demery and Wafer's motion for a judgment of acquittal.

Demery and Wafer claim that their indictment is duplicitous because a single count charged them with using and carrying a firearm during a crime of violence and with possessing a firearm in furtherance of a crime of violence, both in violation of 18 U.S.C. § 924(c). However, a duplicity challenge must be made prior to trial under Fed. R. Crim. P. 12(b) (2) and (f), absent cause for waiver. See *United States v. Price*, 763 F.2d 640, 643 (4th Cir. 1985). Demery and Wafer failed to establish that they raised this issue prior to trial and also failed to establish any cause. Therefore, the claim is waived.

Demery and Wafer claim that the Government knowingly presented perjured testimony at trial. The knowing use of perjured testimony constitutes a due process violation when there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). Demery and Wafer did not cite any specific perjurious statements. Without any evidence of actual perjury, Demery and Wafer cannot prove a perjury claim.

Demery and Wafer finally claim that the Government violated their due process rights by concealing from them the Government's suspicions of Labrina White's involvement in

the robbery. Because Demery and Wafer did not object on this ground at their trial, we review their claim for plain error. *United States v. Olano*, 507 U.S. 725, 732-34 (1993). To meet the plain error standard: (1) there must be an error; (2) the error must be plain; and (3) the error must affect substantial rights. *Id.* If the three elements of the plain error standard are met, the court may exercise its discretion to notice error only if the error seriously affects "the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 736 (citation omitted).

Demery and Wafer contend that the Government's failure to reveal its suspicions about White violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To prove a *Brady* violation, a defendant must show he requested undisclosed evidence and that it was (1) favorable; (2) material; and (3) the prosecution had it and failed to disclose it. *See Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *United States v. Stokes*, 261 F.3d 496, 502 (4th Cir. 2001). Evidence tending to impeach a government witness must be disclosed to a defendant if known to the government. *Giglio v. United States*, 405 U.S. 150, 153 (1972).

The record does not reveal the extent of the Government's suspicions about White's involvement in the robbery, but Demery and Wafer do not cite any evidence of those suspicions withheld from them except for the original notes of law enforcement officers. As Demery and Wafer concede, they had access to report summaries of the officers that included the material information contained in the notes. Demery and Wafer simply theorize that the Government must have had more evidence proving White's participation in the robbery. Demery and Wafer have failed to identify any actual evidence the Government suppressed and thus cannot establish a *Brady* claim. Moreover, Demery and Wafer had sufficient information of the possible participation of White from the facts in the record and could have impeached White with that suspi-

cion or investigated it further before the trial. Demery and Wafer cannot prove error, that the error was plain, or that it affected their substantial rights.

Accordingly, we affirm Demery and Wafer's convictions and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed February 13, 2006]

No. 05-4332 (L)
CR-03-15

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

QUINCY DEMERY,
Defendant-Appellant.

No. 05-4510
CR-03-15

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY DARRYL WAFER,
Defendant-Appellant.

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Luttig, Judge Williams, and Senior Judge Hamilton.

For the Court,

/s/ Patricia S. Connor
Clerk